

ROBERT A. GURR (State Bar No. 13722)
JARED G. BRANDE (State Bar No. 11514)
GURR BRANDE & SPENDLOVE, PLLC
491 E. Riverside Dr., 4B
St. George, UT 84790
Telephone: 435-634-8889
Facsimile: 866-232-8818
rob@gurrbrande.com
jared@gurrbrande.com

Attorneys for Plaintiff
David Clay

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

DAVID CLAY, an individual,

Plaintiff,

v.

GREGORY D. McLAUGHLIN aka Kyle
McLaughlin, an individual, CASEY
McLAUGHLIN, an individual, JOHN AND
JANE DOES I-XX, JOHN DOE
CORPORATIONS I-X, and OTHER JOHN
DOE ENTITIES I-X,

Defendants.

COMPLAINT

Case No.: 4:18-cv-00064-DN

Judge David Nuffer

COMPLAINT

Plaintiff David Clay ("Clay") files this Complaint against Defendants Gregory D. McLaughlin, aka Kyle McLaughlin, ("Gregory") and Casey McLaughlin ("Casey"), and alleges as follows:

THE PARTIES

1 business in this District and the events giving rise to this action occurred in this District.

2 Further, this Court has personal jurisdiction over the Defendants because minimum contacts
3 have been established with the forum and the exercise of jurisdiction would not offend
4 traditional notions of fair play and substantial justice.

5 **FACTUAL BACKGROUND**

6
7 11. In or around 2009, Clay became aware of the Starving Student Card (the
8 “Card”) while attending Utah Valley University (“UVU”).

9 12. The Card is a coupon book that consumers can purchase which entitles the
10 consumer to discounted or free merchandise or services.

11 13. The Card is typically sold by secondary and post-secondary students, or school
12 organizations, as a method of fundraising.

14 14. The Card is typically valid for one year, expiring on the last day of August.

15 15. The Card has been sold in Utah and Nevada.

16 16. Gregory was the owner of multiple businesses related to the Card, including
17 Starving Student Card Inc. and Starving Student Fundraising, Inc. These businesses are
18 currently in “expired” status with the Utah Division of Corporations and Commercial Code.
19

20 17. On January 23, 2003, Starving Student Fundraising, Inc. filed an application for
21 the trademark “Starving Student Card” with the United States Patent and Trademark Office
22 (“USPTO”).
23

24 18. On August 31, 2004, Starving Student Card was registered as a trademark with
25 the USPTO (Registration No. 2878475, hereafter referred to as the “Trademark”).
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1 19. On August 6, 2010, Starving Student Fundraising, Inc. executed an assignment
2 which assigned “the entire interest and the goodwill” of the Trademark to Gregory, which was
3 recorded with the USPTO on August 9, 2010.

4 20. In or around 2010, Clay purchased from Gregory the Southern Utah region for
5 the sales of the Card.

6 21. In or around 2015, Gregory began working on a new software application,
7 which was eventually named “SmartSavers.club” (hereafter referred to as the “App”).

8 22. Gregory touted that the App would eventually replace the Card in its physical
9 form.

10 23. Gregory requested that Clay inform the businesses that Clay was negotiating
11 with who would provide the offers on the Card that the App would be available in 2016.

12 24. Pursuant to these instructions, Clay promoted the App to the businesses with
13 which he negotiated.

14 25. Gregory agreed to pay Clay a commission from the sales of the App in exchange
15 for Clay’s promotion of the App and uploading deals from his business contacts to the App.

16 26. Despite Gregory’s representations, the App was not finished for the 2016-2017
17 season.

18 27. In furtherance of Gregory’s goal to have the App replace the physical version of
19 the Card, he contracted with a call center to solicit businesses to place offers in the App.

20 28. Eventually, Gregory finished development of the App.

21 29. In November 2016, Gregory informed Clay that he intended to sell the rights
22 associated with the Card.

1 30. Clay offered Gregory \$10,000.00 for the worldwide rights associated with the
2 Card, the URL www.starvingstudentcard.com (the “URL”), the Trademark, merchant lists for
3 areas where the Card had been sold, and contact information for bookstore directors
4 (collectively referred to as the “Purchased Assets”).

5 31. On November 29, 2016, Gregory executed a notarized agreement (the
6 “Agreement”) where he acknowledge that he agreed to transfer the Purchased Assets to Clay
7 and would take the action necessary to effectuate the transfer.
8

9 32. Gregory drafted the Agreement and delivered a signed copy to Clay.

10 33. In the Agreement, Gregory also acknowledged that he received the \$10,000.00
11 from Clay on November 14, 2016, which “complet[ed] the purchase of the [Card].”
12

13 34. In the Agreement, Gregory also wrote that he was interested in working with
14 Clay in connection with the Card in Utah County in exchange for a commission for the
15 former’s sales.

16 35. Clay agreed to allow Gregory to continue selling the Card in the Provo/Orem
17 area and provided the latter with 6,000 copies of the Card. Clay agreed to a commission split
18 of 10% to him and 90% to Gregory for the latter’s sales of the Card in Provo/Orem.
19

20 36. Prior to Clay agreeing to the 90-10 split, Gregory held hostage the GoDaddy®
21 username and password necessary to effectuate the transfer of the URL. Only after the
22 commission agreement did Gregory finally provide the username and password to Clay.
23

24 37. Clay asked his web designer to use the credentials to transfer the URL to Clay.

25 38. After Gregory signed the Agreement and Clay paid Gregory \$10,000.00, Clay
26 made multiple requests to Gregory to assign the Trademark to Clay. Despite making several
27
28

1 promises to effectuate the assignment, Gregory never assigned the Trademark to Clay, in
2 violation of the terms of the Agreement.

3 39. In July 2017, Clay uploaded to the App several offers from businesses with
4 which had negotiated. These offers uploaded by Clay constituted around 80-90% of all the
5 offers that had been uploaded to the App.

6 40. These businesses were located in St. George, Cedar City, Hurricane, Provo,
7 Orem, Salt Lake City, and Mesquite, Nevada.

8 41. Around that same time, Gregory began making sales of the Card and App on the
9 campuses of Brigham Young University ("BYU") and UVU.

10 42. Between September 2017 and December 2017, Clay requested that multiple
11 times that Gregory provide an accounting for the sales of the Card that Gregory made in
12 Provo/Orem.

13 43. Gregory never provided the accounting and never paid Clay any of the funds for
14 his sales of the Card in Provo/Orem, nor did he pay Clay any of the agreed upon commissions
15 on the sales of the App.

16 44. In December 2017, Clay learned that Gregory had "left town" in early
17 November of that year and possibly moved out of the country.

18 45. In January 2018, Gregory did not show up to make sales of the Card or the App
19 on the campuses of BYU or UVU.

20 46. Instead, Gregory sent others to make sales.

21 47. Neither Gregory nor his representatives have sent Clay any portions of their
22 sales of the Card.

48. In April 2018, after having no contact with Gregory for several months, Clay began working on preparing the 2018-2019 version of the Card for sale.

49. In August 2018, Clay discovers that his web designer had not actually transferred the URL to Clay when he had access to Gregory's GoDaddy® account.

50. Upon making this discovery, Clay emailed Gregory requesting that the latter transfer the URL to the former. Gregory refused to transfer the URL.

51. After Clay informed Gregory that the URL had not actually been transferred, Gregory linked his Square® account to the URL and began selling old versions of the Card through the URL and collecting funds from those sales through his Square® account.

52. These old versions of the Card which Gregory began selling contain a stamp instructing consumers to trade the old card in for a new card on campus.

53. Using the URL, Gregory also posted online an option for consumers to purchase a lifetime membership to the App and receive a free version of the Card for life.

LIFETIME MEMBERSHIP - Smart Savers Club for the next 50 customers
\$149.00

Regular
In an effort to raise money to pay additional programming costs we are offering 50 of our most loyal current customers the opportunity to get lifetime access to the Smart Savers Club App for just \$149. This will also include one complimentary Starving Student Card a year as well.

App Normally sells w/ Student Discount for \$60 a year or \$5 monthly.

Within 24 hours we will create a custom unique access code, and email it to you along with download and use instructions. Your card will ship the week of September 1st and we ship a one free card each year at no extra charge for life.

IMPORTANT NOTE: Please indicate which area and what particular card you want, ie. UofU, BYU, Etc. Thanks!!

For more information please visit:
<https://www.smartsavers.club/products/byu-smart-savers-club-app-2-for-40-annual-subscription>
[View less](#)

Shipping Free. Ships within 7 days to United States addresses only.

E-Delivery Fulfilled electronically by email

Returns [View more](#)

Share:

Qty. [Add to Cart](#) **\$149.00**

54. Gregory or other Defendants have also contacted individuals at BYU and UVU and encouraged them to stop selling the Card.

55. Upon information and belief, Defendant Casey McLaughlin (“Casey”) is Gregory’s son.

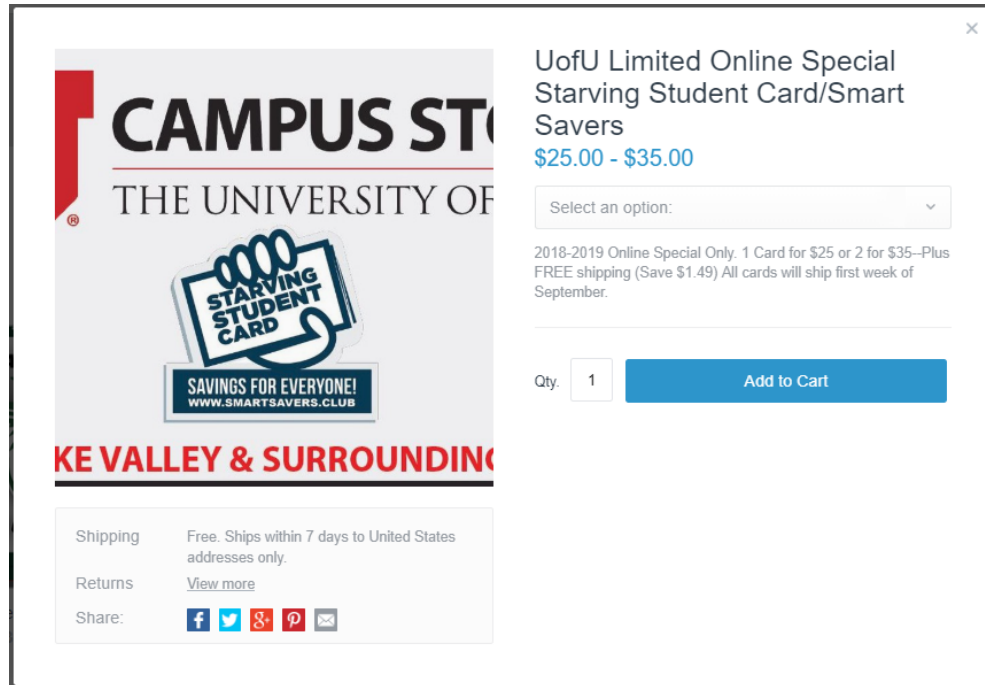
56. Upon information and belief, Casey has been cooperating with Gregory since January 2018, and perhaps before, in negotiating and selling the Card.

57. Without Clay’s permission or consent, Defendants requested that Seagull Printing produce counterfeit versions of the 2018-19 version of the Card. Seagull Printing refused.

58. Defendants produced a counterfeit, digital version of the Card for the 2018-19 season and presented to McNeil Printing in Utah County. At Defendants’ request, McNeil Printing to produce 10,000 counterfeit copies of the Card for sale at BYU and in Utah and Salt Lake Counties.

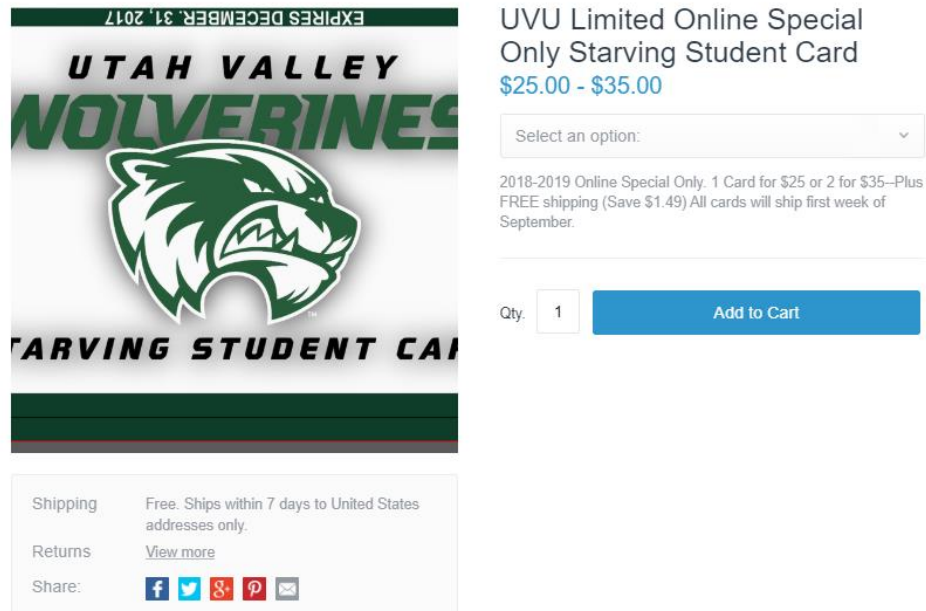
59. Defendants are selling the counterfeit copies of the Card, which bear the Trademark.





60. When a user types in the URL, he is redirected to <https://squareup.com/store/starvingstudentcard>, which is controlled by Defendants and includes multiple references to the Trademark.





61. Defendants have contacted third parties who have (1) previously purchased the Card or (2) with whom Clay and his representatives have had a business relationship and conveyed to these third parties that Clay and his representatives no longer involved with the Card and that all sales should through Defendants.

62. Defendants have also contacted third parties and accused Clay and his representatives of committing fraud.

FIRST CAUSE OF ACTION
(Federal Trademark Infringement-15 U.S.C. 1114)

63. Clay alleges and incorporates by reference the allegations contained in paragraphs 1 through 62 above, as though fully set forth herein.

64. Clay is the rightful owner of the Trademark.

65. The Agreement has been recorded with the USPTO and it has transferred ownership of the Trademark to Clay.

1 66. Defendants are using the Trademark in connection with their sales of counterfeit
2 versions of the Card.

3 67. Defendants do not have Clay's permission to use the Trademark.

4 68. Defendants' use of the Trademark is a violation of 15 U.S.C. 1114(1)(a) in that
5 the Defendants have, without the consent of Clay, used in commerce a reproduction,
6 counterfeit, copy, or colorable imitation of the Trademark in connection with the sale, offering
7 for sale, distribution, or advertising of goods and services provided by Defendants. Defendants
8 have used the imitation in such a manner as is likely to cause confusion, mistake, or deceive.
9

10 69. Defendants' use of the Trademark is a violation of 15 U.S.C. 1114(1)(b) in that
11 the Defendants have, without Clay's consent, used in commerce a reproduction, counterfeit,
12 copy, or colorable imitation of the Trademark and applied such reproduction, counterfeit, copy,
13 or colorable imitation to advertisements intended to be used in commerce in connection with
14 the sale, offering for sale, distribution, or advertising of goods and services provided by
15 Defendants. Defendants have used the imitation in such a manner as is likely to cause
16 confusion, mistake, or deceive.
17
18

19 70. Defendants' use of an imitation of the Trademark is committed with knowledge
20 that the imitation was intended to be used to cause confusion, mistake, or to deceive.

21 71. Clay is entitled to injunctive relief under 15 U.S.C. 1116 and recovery of
22 damages from Defendants jointly and severally pursuant to 15 U.S.C. 1117. Damages
23 recoverable are three times the actual damages sustained by Clay, Defendants' profits, and the
24 costs of the action, together with Clay's attorney fees, or in the alternative, damages in such
25 sum as the Court may find to be just according to the circumstances of the case.
26

27 **SECOND CAUSE OF ACTION**
28 **(Trademark Infringement - 15 U.S.C. 1125(a))**

1 77. Defendants' use of an imitation of the Trademark has caused and continues to
2 cause dilution of the distinctive quality of the Trademark. Defendants use of an imitation of the
3 Trademark is a violation of 15 U.S.C. 1125(c), the Trademark being distinctive and famous
4 within the meaning of the statute and Defendants' use of and imitation of the Trademark in
5 commerce having begun after the Trademark became distinctive and famous.

6 78. Defendants willfully intended to trade on Clay's reputation and/or cause dilution
7 of the Trademark by their use of an imitation of the Trademark.
8

9 79. Clay is entitled to injunctive relief under 15 U.S.C. 1116 and recovery of
10 damages from Defendants jointly and severally, pursuant to 15 U.S.C. 1117(a). Damages
11 recoverable are actual damages sustained by Clay, the Defendants' profits, and the costs of the
12 action together with Clay's reasonable attorney fees. In the alternative, Clay is entitled to
13 recover damages in such sum as the Court may find just according to the circumstances of the
14 case.
15

16 **FOURTH CAUSE OF ACTION**
17 **(Trade Dress Infringement – 15 U.S.C. 1125(a))**

18 80. Clay re-alleges and incorporates by reference the allegations contained in
19 paragraphs 1 through 78 above, as though fully set forth herein.
20

21 81. Clay is entitled to legal protection of the Card's trade dress under 15 U.S.C.
22 1125(a), which trade dress includes without limitation a distinctive design that features a
23 foldable card, with distinct headings and colors.

24 82. The Card's trade dress has acquired secondary meaning as consumers have
25 come to recognize Clay as the source of the Card.
26
27
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1 83. Defendants' counterfeit version of the Card is such that the consuming public
2 has been confused and will continue to be confused as to the source or origin of Defendants'
3 goods and services and will erroneously believe that they came from Clay.

4 84. In the eye of an ordinary observer, giving such attention as a purchaser usually
5 gives, the Card legitimately sold by Clay and Defendants' counterfeit version are substantially
6 the same and the resemblance is such so as to deceive an ordinary observer, inducing an
7 ordinary observer to purchase Defendants' version of the Card believing it to be Clay's.
8

9 85. Defendants' copying of the Card is intentional.

10 86. Defendants' version of the Card is nearly identical to Clay's.

11 87. Defendants' acts of trade dress infringement have caused and continue to cause
12 damages and injury to Clay.
13

14 88. Clay may recover for his damages an award to compensate him for injuries and
15 damages he has sustained as a result of Defendants' conduct which violates 15 U.S.C. 1125(a).
16

17 89. Because Defendants' acts are intentional, willful, and/or deliberate, Clay is
18 entitled to an award of treble damages.

19 90. Clay is entitled to an award of pre-judgment interest for the damages sustained
20 as a result of Defendants' wrongful conduct.

21 91. Defendants' wrongful, malicious, fraudulent, deliberate, willful, and/or
22 intentional conduct makes this an exceptional case entitling Clay to an award of attorney's fees
23 and costs.
24

25 92. Clay has no adequate remedy at law. Clay has suffered and continues to suffer
26 irreparable harm as a result of Defendants' acts, and is therefore entitled to permanent
27 injunctive relief to enjoin Defendants' wrongful conduct.
28

FIFTH CAUSE OF ACTION
(Federal Unfair Competition, False Designation of Origin, Passing Off, and False Advertising – 15 U.S.C. 1125(a))

93. Clay re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 91 above, as though fully set forth herein.

94. The unauthorized use by Defendants of the Card's trade dress through the sale of Defendants' counterfeit version, is likely to cause the public to mistakenly believe that Defendants' products originate from, are endorsed by, or are in some way affiliated with Clay and thus constitute unfair competition, false designation of origin, and passing off.

95. In addition, the Card is likely to lose its significance as an indicator of origin if Defendants are allowed to continue their infringement.

96. Defendants have used the Card's trade dress in connection with false and misleading descriptions or representations of fact in promoting Defendants' counterfeit version, thereby misrepresenting the nature, characteristics, source, and qualities of their goods, services or commercial activities.

97. Defendants' actions are thus in violation of 15 U.S.C. 1125(a).

98. As set forth above, on information and belief, Defendants' misconduct is part of a deliberate plan to trade off the valuable goodwill established by Clay and has been carried out in willful disregard of Clay's rights and thereby constitutes a violation of 15 U.S.C. 1125(a).

99. Because Defendants' acts are intentional, willful, and/or deliberate, Clay is entitled to an award of treble damages.

100. Clay is entitled to an award of pre-judgment interest for the damages sustained as a result of Defendants' wrongful conduct.

1 101. Defendants' wrongful, malicious, fraudulent, deliberate, willful, and/or
2 intentional conduct makes this an exceptional case entitling Clay to an award of attorney's fees
3 and costs.

4 102. Clay has no adequate remedy at law. He has suffered and continues to suffer
5 irreparable harm as a result of Defendants' acts and is therefore entitled to permanent injunctive
6 relief to enjoin Defendants' wrongful conduct.

7
8 **SIXTH CAUSE OF ACTION**
9 **(Common Law Unfair Competition, Misappropriation, and Trade Dress Infringement -**
10 **Unfair Practices Act, Utah Code Ann. § 13-5-1 et seq.)**

11 103. Clay re-alleges and incorporates by reference the allegations contained in
12 paragraphs 1 through 101 above, as though fully set forth herein.

13 104. By their aforesaid conduct, calculated to increase business and profits by
14 deceiving and confusing members of the public, Defendants continue to misappropriate the
15 valuable goodwill of the Card's trade dress, to infringe Clay's rights therein, and unfairly
16 compete with Clay under the common laws of Utah.

17 105. Defendant's use of the Card's trade dress to promote, mark, or sell products
18 constitutes an unfair practice under Utah Code Ann. § 13-5-1 et seq.

19 106. Defendant's use of the Card's is an unfair or deceptive method of competition
20 occurring in trade or commerce that impacts the public interest and has caused, and is causing,
21 injury to Clay and consumers.

22
23 **SEVENTH CAUSE OF ACTION**
24 **(Breach of Contract)**

25 107. Clay re-alleges and incorporates by reference the allegations contained in
26 paragraphs 1 through 105 above, as though fully set forth herein.

27 108. The Agreement is a valid enforceable contract.
28

1 109. In the Agreement, Gregory agreed to “transfer all ownership, title and interest of
2 the Starving Student Card in it’s [sic.] entirety” which included the Purchased Assets

3 110. Clay agreed to pay \$10,000.00 for the Purchased Assets.

4 111. In the Agreement, Gregory acknowledged that he received the \$10,000.00 from
5 Clay on November 14, 2016.

6 112. Clay has performed his obligations under the Agreement.

7 113. Gregory has refused to cooperate with Clay in the recording of the transfer of
8 the Trademark with the USPTO.

9 114. Gregory has refused to transfer the URL to Clay.

10 115. Gregory is therefore in breach of the Agreement.

11 116. Gregory’s breach of the Agreement is material.

12 117. Gregory’s purpose in breaching the Agreement has been to injure Clay and ruin
13 his business operations.

14 118. Clay has suffered damages as a result of Gregory’s breach.

15
16 **EIGHTH CAUSE OF ACTION**
17 **(Breach of the Implied Covenant of Good Faith and Fair Dealing)**

18 119. Clay re-alleges and incorporates by reference the allegations contained in
19 paragraphs 1 through 117 above, as though fully set forth herein.

20 120. Every contract includes an implied covenant of good faith and fair dealing,
21 which requires the parties to not intentionally or purposely do anything that will destroy or
22 injure the other party’s right to receive the fruits of the contract.

23 121. Gregory has breached the implied covenant included in the Agreement.

24 122. Gregory has intentionally refused to perform under the Agreement in order to
25 injure Clay.
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1 123. Gregory has breached the implied covenant by continuing to use the Trademark
2 without authorization.

3 124. Gregory has breached the implied covenant by misrepresenting to third parties
4 that Clay has committed fraud.

5 125. Gregory has breached the implied covenant by misrepresenting to third parties
6 that he has the rights to the Trademark.

7 126. Gregory has breached the implied covenant by inducing third parties to not do
8 business with Clay.

9 127. As a result of Gregory's breach of the implied covenant of good faith and fair
10 dealing, Clay has been damaged.

11
12
13 **NINTH CAUSE OF ACTION**
14 **(Unjust Enrichment)**

15 128. Clay re-alleges and incorporates by reference the allegations contained in
16 paragraphs 1 through 126 above, as though fully set forth herein.

17 129. Clay conferred a benefit on Gregory by transferring \$10,000.00 to the latter.

18 130. Although Gregory received the \$10,000.00 from Clay, he did not transfer the
19 URL or Trademark to Clay.

20 131. Clay further conferred a benefit on Gregory by providing him with 6,000 copies
21 of the Card to sell in Utah County.

22 132. Gregory has sold versions of the Card that he received from Clay and did not
23 share the proceeds with Clay.

24 133. Clay conferred a benefit on Gregory by uploading deals to the App.

25 134. Gregory and then sold subscriptions of the App and did not share the proceeds
26 with Clay.
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1 135. Gregory solicited from Clay these benefits which he received. Therefore,
2 Gregory has knowledge of the benefits he received from Clay.

3 136. Based on these circumstances, it would be unjust for Gregory to retain these
4 benefits without compensation to Clay.

5
6 **TENTH CAUSE OF ACTION**
7 **(Intentional Interference with Economic Relations)**

8 137. Clay re-alleges and incorporates by reference the allegations contained in
9 paragraphs 1 through 135 above, as though fully set forth herein.

10 138. Defendants have intentionally made false statements about Clay to individuals
11 and entities with whom Clay has had a business relationship.

12 139. Defendants have misrepresented to the third parties that Clay has committed
13 fraud.

14 140. Defendants have intentionally misrepresented to third parties that Defendants
15 have the rights to the Trademark.

16 141. Gregory deliberately breached the Agreement with the immediate purpose to
17 injure Clay rather than to obtain relief from his obligations under the Agreement.

18 142. Gregory's breach of the Agreement has had a ruinous effect on Clay's business
19 and the damages to Clay are not compensable merely by contract damages.

20 143. Defendants misrepresentations and defamatory comments, and Gregory's
21 deliberate breach of the Agreement with the purpose of injuring Clay, are improper means by
22 which Defendants have interfered with Clay's economic relationships.

23 144. Defendants intentional interference by improper means has caused Clay to lose
24 business.
25
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PRAYER FOR RELIEF

WHEREFORE, Clay prays for judgment and relief as follows:

A. An entry of judgment holding that Clay is the rightful owner of the Trademark and that Defendants have and are infringing the Trademark;

B. A preliminary and permanent injunction against Defendants and their employees, agents, servants, attorneys, instrumentalities, and/or those in privity with Defendants, from infringing the Trademark and the Card's trade dress, or inducing the infringement of the Trademark and the Card's trade dress, and for all further and proper injunctive relief pursuant to 15 U.S.C. 1116 and 1117;

C. A preliminary and permanent injunction against Defendants and their employees, agents, servants, attorneys, instrumentalities, and/or those in privity with Defendants, from producing, causing to be produced, selling, or otherwise distributing counterfeit versions of the Card.

D. An award to Clay of such past damages, not less than a reasonable royalty, as he shall prove at trial against Defendants that is adequate to fully compensate Clay for Defendants' infringement of the Trademark;

E. A determination that Defendants' infringement has been willful, wanton, and deliberate and that the damages against them be increased up to treble on this basis or for any other basis in accordance with the law;

F. A finding that this case is "exceptional" and an award to Clay of his costs and reasonable attorney fees;

G. An accounting of all infringing sales and revenues, together with post judgment interest and prejudgment interest from the first date of infringement of the Trademark;

1 H. An accounting of all sales of the Card by Defendants since November 14, 2016;

2 I. An order requiring specific performance by Gregory that he execute all
3 documents as are reasonably necessary to transfer the Trademark and URL to Clay.

4 J. An award to Clay of monetary damages on the claims above as he shall prove at
5 trial against Defendants; and

6 K. Such further and other relief as the Court may deem proper and just.

7
8 Respectfully submitted,

9 /s/ Jared G. Brande

10 Dated: September 21, 2018.

11 By: _____
12 Robert A. Gurr (State Bar No. 13722)
13 Jared G. Brande (State Bar No. 11514)
14 GURR BRANDE & SPENDLOVE, PLLC
15 491 E. Riverside Dr., Suite 4B
16 St. George, UT 84790
17 Telephone: 435-634-8854
18 Facsimile: 866-232-8818
19 rob@gurrbrande.com, jared@gurrbrande.com

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21 *Attorneys for Plaintiff,*
22 DAVID CLAY
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